IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75–

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

DONALD J. ZOLNAY and GUNTER E. VOELPEL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

EVELLE J. YOUNGER
Attorney General

JACK R. WINKLER
Chief Assistant Attorney General
Criminal Division

ARNOLD O. OVEROYE
Assistant Attorney General

MICHAEL FRANCHETTI
Deputy Attorney General

WILLARD F. JONES
Deputy Attorney General

PETER J. McBRIEN
Deputy Attorney General

555 Capitol Mall, Suite 550
Sacramento, California 95814
Telephone: (916) 445-1022

Attorneys for Petitioner

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The People of the State of California respectfully petition that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of California entered in this case on December 15, 1975.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California, filed on December 15, 1975, is printed as Appendix A hereto and is reported at 15 Cal.3d 729 ___ Cal.Rptr. _____ _____ P.2d ___ (December 15, 1975).

The opinion of the California Court of Appeal, Third Appellate District, filed on April 29, 1975, and

modified on May 15, 1975, is printed as Appendix B hereto.

The opinion of the Mono County Superior Court is printed as Appendix C hereto.

JURISDICTION

The Supreme Court of the State of California entered judgment in this case on December 15, 1975. The timely petition for rehearing and/or modification of opinion was filed, and on January 14, 1976, the Supreme Court of the State of California entered its order denying the petition for rehearing. (The order denying the petition for rehearing is printed as Appendix D hereto.)

The jurisdiction of this Court is invoked under Title 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED

I

Whether any question may be asked of suspects after one of the suspects has inquired about his right to counsel under *Miranda*?

II

Whether a suspect may invoke the right to counsel under *Miranda* for another suspect against the second suspect's wishes?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which the present case involves is the Fifth Amendment to the United States

Constitution. The Fifth Amendment provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when an actual service in time of war or public danger; nor shall a person be subject for the same offense or twice be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, or that due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A. Lower State Court Proceedings

By information filed May 9, 1973, the Mono County District Attorney charged respondents Gunter E. Voelpel and Donald J. Zolnay with burglary (California Penal Code section 459). See Appendix E. On July 18, 1973, after motion to dismiss had been made the motion was granted (California Penal Code section 995). See Appendix F.

On August 31, 1973, the Mono County Grand Jury returned two indictments against respondents charging them with burglary (California Penal Code section 459). See Appendix G. Respondents made a motion to dismiss the indictments (California Penal Code section 995) and on June 28, 1974, the Mono County Superior Court denied that motion. See Appendix H.

On October 10, 1974, respondents made an oral motion to suppress (California Penal Code section 1538.5), (see Appendix I), and on October 10, 1974, a hearing was held pursuant to the motion. On December 11, 1974, the Mono County Superior Court granted the motion to suppress.

B. State Appellate Proceedings

A petition for an original writ of mandamus was filed in the California Court of Appeal, Third Appellate District, on January 10, 1975, by the People of the State of California pursuant to California Penal Code section 1538.5(o). That petition was granted on April 29, 1975, in an unpublished opinion filed by the California Court of Appeal, Third Appellate District. On May 15, 1975, on its own motion the California Court of Appeal, Third Appellate District, modified its opinion filed April 29, 1975, and ordered the opinion certified for publication.

On June 9, 1975, the respondents filed a petition for hearing in the California Supreme Court and on June 25, 1975, hearing was granted.

On December 15, 1975, the California Supreme Court denied the petition for writ of mandate requested by the petitioner. On December 30, 1975, a petition for rehearing was filed and on January 14, 1976, the petition for rehearing was denied.

FACTUAL STATEMENT

On March 17, 1973, a Mr. Alpers, owner and operator of the Owens River Ranch in Mono County,

California, went to the ranch (GJT 9–10).[1] The ranch was closed due to the recent heavy snows, but on his way into the ranch Mr. Alpers noticed snowmobile tracks (GJT 10–12). Upon arriving at the ranch, Mr. Alpers noted that a stove was sitting atop a snow bank adjacent to the laundry building where it was normally placed (GJT 12).

Further investigation of the premises disclosed that nails holding closed a screen at the lodge were bent outward (GJT 14). An antique stove, bedding, cooking supplies, and items which were the personal property of Mr. Alpers, were missing from the ranch (GJT 15–21). One of the cabins had been forced open and a stove was missing from that cabin (GJT 21). The items taken were valued at from five to ten thousand dollars (GJT 26).

The snowmobile tracks leading to and from the ranch disclosed a light load coming to the ranch and a heavy load leading away from the ranch (GJT 24).

A warden, Wes Johnson, had observed a ski-boose type sled with a toboggan inside it, parked at a deserted cabin approximately a mile from the lodge of the Owens River Ranch (GJT 30–31). This deserted cabin was investigated and empty bottles and cans discovered inside (GJT 31). On the snow near this cabin, fresh soot was observed (GJT 31).

During an investigation centered upon owners of ski-boose type sleds of the type seen at the deserted cabin, Deputy Sheriff Harley Wilmot contacted Mr.

[1] GJT refers to the Grand Jury Transcript of proceedings held on August 31, 1973.

Voelpel (GJT 28–33). Deputy Wilmot had discovered that Mr. Voelpel and Mr. Zolnay had been riding a ski-boose type sled in the Owens River area and had had snowmobile trouble (GJT 32). Mr. Voelpel was contacted on March 18, 1973, at the Jagerhof Motel (GJT 32–33).

Voelpel admitted being in the area of the Owens River but denied being at the Alpers Ranch area (GJT 33). Voepel admitted owning a ski-boose type sled but denied owning a toboggan (GJT 33). Then, Mr. Voelpel, Mr. Zolnay, Deputy Strong and Deputy Wilmot left the garage area of the motel and went upstairs to the lobby area (GJT 34). While upstairs, Deputy Wilmot advised Voelpel and Zolnay of their *Miranda* rights (384 U.S. 436) (GJT 34–35). Both Voelpel and Zolnay waived each of these rights (GJT 35). Then Deputy Strong again asked Mr. Voelpel whether he was absolutely sure that he understood each of these rights, and Voelpel stated that he did (GJT 35).

After being advised of their *Miranda* rights, Zolnay and Voelpel were asked what time they left for the Owens River area, what their route was, and whether they had seen anybody enroute (GJT 36). Voelpel indicated that they had seen two individuals on snowmobiles and he believed that one was the manager of the Tamarack Condominiums (GJT 37). The suspects denied being immediately adjacent to the Alpers Ranch Lodge but admitted being approximately 200 yards away (GJT 37–38). Deputy Wilmot advised Voelpel and Zolnay that he would like them to accompany him to the sheriff's substation (GJT 38). Mr. Voelpel stated that he had friends visiting but would be glad to go to the substation the next day with Zolnay (GJT 38). Voelpel and Zolnay were told that they would be asked to give some fingerprints for the investigation while at the substation (RT 38).

After leaving Voelpel and Zolnay, the officers contacted Mr. Downing of the Tamarack Condominiums (GJT 39). Mr. Downing had encountered people on a ski-boose snowmobile with a sled, and his description of one of these persons matched Zolnay (GJT 39–40).

On March 19, 1973, at approximately 10:00 a.m., both Zolnay and Voelpel came to the sheriff's substation and were fingerprinted (GJT 40–41; II RT 3–4).[2] Each suspect was questioned separately, first Voelpel, then Zolnay (II RT 4). Their rights under *Miranda* were not re-read to the suspects (GJT 40). Neither suspect made any admission of guilt during this separate questioning which lasted approximately 15 minutes for each suspect (GJT 42; II RT 5).

Wilmot and Strong then confronted Zolnay and Voelpel in a single room, with the information they had obtained through their investigation (II RT 6). The deputies focused their questioning upon the conflict in stories about the toboggan (II RT 6). Voelpel and Zolnay were told they had admitted to being in the area and seeing Mr. Downing, and that Mr. Downing and Game Warden Johnson had seen a ski-boose

[2] The transcript of the suppression hearing held October 10, 1974, will be described herein as "I RT" (Volume I of the suppression hearing) and "II RT" (Volume II of the suppression hearing).

type sled with a toboggan (GJT 42; II RT 6–7). Voelpel and Zolnay were told that they were prime suspects (II RT 7). Strong told them that he thought they had committed the crime and that the officers were going to continue investigating until the facts were determined. (II RT 7–8, 12–13).

Voelpel then asked, "Do you think that we need an attorney?" (or alternatively, "I guess we need a lawyer") (II RT 8–9; GJT 42). Officer Strong replied, "I think you do need an attorney, as I previously explained to you your rights yesterday afternoon" (II RT 8–9; GJT 42–43). Zolnay made no responses or comments at this time (II RT 9). Voelpel seemed concerned that he did not have an attorney under regular employment and asked if the deputies could recommend an attorney (GJT 43; II RT 9, 20). One of the deputies then mentioned the names of some local attorneys and Deputy Wilmot tendered a local telephone book to the suspects (GJT 43; II RT 12, 20). Neither Voelpel nor Zolnay made any effort to accept the telephone book held by Deputy Wilmot and it was placed on the desk by Wilmot (GJT 43; II RT 12, 20–21, 24). The deputies told the suspects that they should talk it over and decide what they wanted to do, and that they could make the deputies' job "easy" or "tough" (GJT 43; II RT 12). The deputies then left the room (GJT 43; II RT 12). The room contained a phone with three outside lines (II RT 13–14).

Approximately five or ten minutes later the deputies reentered the room and asked if the suspects had

made any decisions (GJT 43–44; II RT 14). Mr. Zolnay said, "Well, I cannot speak for Mr. Voelpel, but as for myself, I would like to get this off of my conscience and that we did in fact commit the burglary" (GJT 44; II RT 14). Zolnay stated that he had been unable to sleep, was upset by the situation, and had discussed it with his wife the night before (GJT 44; II RT 14). Zolnay further stated that he had discussed with Voelpel the prospect of returning the property (II RT 14).

SUMMARY OF ARGUMENT

The California Supreme Court, relying on *Miranda* v. *Arizona,* ruled that even ambiguous statements of a defendant concerning his right to counsel must be construed as an invocation of that right to counsel. Furthermore, the Court ruled that one defendant can invoke the right to counsel under *Miranda* of a codefendant even though circumstances indicate that the codefendant wished to waive those rights.

Petitioner contends that such an interpretation of *Miranda* is patently offensive to both the letter and spirit of that ruling. The *Miranda* rule sought to establish safeguards that would protect the constitutional rights of an accused during custodial interrogation. The *Miranda* rule was intended to insure that an accused was fully and effectively advised of his rights in order to counterbalance the "inherently compelling pressures" of custodial interrogation. However, as long as *Miranda* rights are given and the accused is given an opportunity to exercise these rights, equivo-

cal questions by the accused concerning the importance of the *Miranda* rights should not be construed as an invocation of one's *Miranda* rights.

The California Supreme Court in reaching its decision that respondents had invoked their *Miranda* rights relied upon language in *Miranda* to the effect than an accused may indicate ". . . in any manner and at any stage of the process that he wishes to consult with an attorney . . ." and then the questioning must cease (*Miranda* v. *Arizona,* 384 U.S. 436, 444–445 (1966). Implicit in this statement from *Miranda* is a recognition that the communication between the accused and the interrogator must be understandable as an invocation or a waiver of the accused's *Miranda* rights. Where the communication is ambiguous, clarifying questions should be permitted.

The petitioner in the case now before this Court also contends that one's privilege against self-incrimination through the right to counsel under *Miranda* may not be invoked by a co-accused when the circumstances indicate that the originally silent co-accused intends to waive those rights. Thus, even though Voelpel spoke of "we" needing an attorney, Zolnay did not in any manner indicate that this sentiment was shared by him and, in fact, indicated through the prefatory words to his confession that he was speaking for himself.

In this case now before the Court none of those evils sought to be prevented by *Miranda* are present. No overbearing conduct appears on the part of the

police; nor does any long incommunicado questioning exist; nor is there any disregard of the accused's rights. In the present circumstances, wherein respondents were accorded all of their rights and the interrogation was reasonable, the confession of respondent Zolnay is not barred by *Miranda.*

Reversal of the California court would in no manner diminish the rights already granted an accused, but would rather support common sense as well as efficient investigation of crime.

ARGUMENT

I. A Clarifying Question May Be Asked of Suspects After One of the Suspects Has Inquired About His Right to Counsel Under Miranda

The California Supreme Court in the instant case held that respondent Voelpel's question, "Do you think we need an attorney?" (or alternatively his statement, "I guess we need a lawyer") was an invocation of the respondents' right to counsel terminating all subsequent qeustioning. Voelpel's statement was construed as an invocation of the right to counsel as described in *Miranda* v. *Arizona,* 384 U.S. 436, 444–445; 86 Sup.Ct. 1602, 1612; 16 L.Ed. 2d 694, 707 (1966), wherein it was stated:

> "Defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking

there can be no questioning. Likewise if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. . . ."

Thus, the California Supreme Court held that the subsequent question of the officers as to whether the respondents had made any decisions was prohibited by the dictates of *Miranda*. The Court therefore upheld the finding of the superior court that the respondents' confession should be suppressed and denied the People's petition for writ of mandate. 15 Cal.3d 729, ---- Cal.Rptr. ----, ---- P.2d ---- (December 15, 1975); Petition for Writ of Certiorari, Appendix A.)

The petitioner herein contends that the opinion of the California Supreme Court is an erroneous interpretation of the *Miranda* rule. The California Supreme Court's interpretation, petitioner asserts, is contrary to the purpose of the *Miranda* rule and the proper application of that rule. Moreover, that ruling offends a common sense approach to effective and efficient law enforcement.

A. The Purpose Underlying the *Miranda* Rule Was Fully Respected in the Instant Case

The purpose of the rule fashioned by this Court in *Miranda* was to establish appropriate safeguards to insure that in-custody interrogation was carried out in an atmosphere in which an accused can effectively exercise the full panoply of rights granted him by the federal Constitution, including the right against compulsory self-incrimination and the right to counsel.

384 U.S. 436, 458, 465–480; 86 Sup.Ct. 1602, 1619, 1623–1631. In the words of this Court:

"We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak what he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." 384 U.S. at 467; 16 L.Ed.2d 719, 86 Sup.Ct. at 1624.

". . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." 384 U.S. at 474, 16 L. Ed2d 723, 86 S.Ct. 1628.

The *Miranda* rule was intended to be prophylactic in effect, to provide "practical reinforcement for the right against compulsory self-incrimination". *Michigan* v. *Tucker,* 417 U.S. 433; 94 Sup.Ct. 2357; 41 L.Ed. 2d 182, 193 (1974). The rule is not intended to ". . . be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in

custody has indicated a desire to remain silent. [Footnote omitted]" *Michigan* v. *Mosley* _____ U.S., _____, _____L.Ed. 2d___, _____ S.Ct._____ (December 9, 1975) (44 L.W. 4015, 4017).

The petitioner asserts that the purpose underlying the *Miranda* rule was fully effectuated in the instant case and no breach of respondents' Fifth Amendment rights are extant when the facts surrounding the interrogation in question are considered.

Both respondents were interrogated about a burglary occurring on the Owens River Ranch in Mono County, California. After first being questioned separately, the two respondents were questioned by the two detectives investigating the burglary. After the two respondents had been confronted with the evidence which the officers had ascertained, the two respondents were told that they were prime suspects. Respondent Voelpel then asked, "Do you think that we need an attorney?" (or alternatively, "I guess we need a lawyer"). One of the officers answered affirmatively adding that the respondents had been advised of their right to counsel the previous day. However, the officers testified that they did not construe the statement of respondent Voelpel as a request for an attorney. (II RT 25–26). Rather, the statement appears to be a request for the officers' opinion as to whether an attorney would be needed for respondents. An officer was then asked whether he could recommend an attorney and he replied that he could not but that several attorneys were listed in the telephone directory. However, when the officer attempted to give

the directory to Voelpel neither Voelpel nor Zolnay made any effort to take the directory. Thus, while the words of Voelpel may be construed to operate as an invocation of his right to counsel, his actions, i.e., refusing to accept the telephone directory belie that interpretation.

An officer then repeated that he felt the respondents were guilty and that the investigation would continue and that the respondents could make the officers jobs easy or tough. The respondents were then told to discuss the matter and then left alone for five to ten minutes with access to a telephone directory.

When the officers returned they asked the respondents whether they had made any decisions. Zolnay responded, "Well I cannot speak for Mr. Voelpel but as for myself I would like to get this off my conscience and that we did in fact commit the burglary . . . ."

The non-definitive language utilized by respondent Voelpel in his discussion of his right to an attorney, coupled with his refusal to take the telephone book when it was offered to him, created at the most an ambiguity as to whether he was invoking his right to obtain counsel. Thereafter the officers left the respondents alone in an effort to permit them to decide on what course of action the respondents might take. After the officers returned respondent Zolnay, speaking only for himself, indicated that he wished to confess. The circumstances viewed as a whole indicate that the statement of Zolnay was the result of voluntariness both in the traditional sense, *Michigan* v. *Tucker, supra,* 417 U.S. 433, at 441, 94 Sup.Ct. 2357,

at 2362, and within the framework established by *Miranda*, 384 U.S. at 478–479; 86 Sup.Ct. at 1630.

B. The Circumstances of the Instant Case Permitted a Clarifying Question of Respondents by the Officers

The circumstances in this case before the Court establish an inquiry by Voelpel into the availability of counsel without any positive assertion that the right to have counsel present was being invoked. Even assuming that the statements of Voelpel constitute a sufficient indication of his assertion of the right to counsel, the response of the officers, namely, handing the telephone book and the subsequent refusal of respondents to accept the book, belie concluding that the respondents intended the questions of Voelpel to constitute an assertion of that right to counsel. Thus, at the time the officers left the room after indicating that respondents should decide what they wished to do, the status of the invocation of the right to counsel was uncertain.

After reentering the room, the officer's only question ("Have you reached any decisions") was not an interrogation into the respondents' guilt or innocence but only a question as to what course of action the respondents had decided to take.

The concern of the case before this Court differs with the concern focused upon in *Miranda*. In *Miranda* this Court articulated a standard of advisement of rights to be given to an individual in custody (384 U.S. at 478–479). In the case before the Court the issue is whether the police may ask any clarifying

questions of a suspect after the suspect has inquired about his right to counsel under *Miranda*. Petitioner submits that due to the vagaries of communication, a common sense approach to this issue must be adopted, and this approach must take into consideration all the circumstances of the communication.

The conclusion reached by the California Supreme Court obviously did not involve a consideration of all the circumstances of the communication but instead limited its analysis to an interpretation of the language spoken by Voelpel (15 Cal.3d 729, ____; ____ Cal.Rptr. ____, ____; ____ P.2d____ ____). The analysis undertaken by the California Supreme Court did not discuss the proffered telephone book by the officers and what effect the respondents' rejection of this book had upon the allegedly invoked *Miranda* rights. If we assume that the question by Voelpel was on invocation of counsel ("Do you think that we need an attorney" or alternatively, "I guess we need a lawyer") what course of action were the police expected to take when the respondents refused the offered telephone book? Should the police then have abandoned the respondents in that room until the respondents gave some indication that they wished to do something? Could the police not expedite this process by asking the non-interrogating question "Have you reached any decisions?" Petitioner contends that the interpretation of *Miranda* by the California Supreme Court is unrealistically restrictive and offends common sense.

C. Other Factually Similar Cases Have Reached Results Contrary to the Result Reached by the California Supreme Court

Courts other than the California Supreme Court have reached a dissimilar result when confronted with circumstances similar to the case before this Court.

(1) The first point of analysis involves the statement of Voelpel, "I guess we need an attorney?"). This Court in *Frazier* v. *Cupp,* 394 U.S. 731; 89 L.Ed.2d 1420, 22 Sup.Ct. 684 (1969), analyzed a statement similar to that of Voelpel. In *Frazier, supra,* the defendant stated during questioning, "I think I had better get an attorney before I talk anymore. I am going to get into trouble more than I am in now." 394 U.S. 731, 738. Since the statement had been made post-Escobedo[3] but before this Court's decision in *Miranda,* the Court concluded that "Petitioner's statement about seeing an attorney was neither as clear nor as unambiguous as the request Escobedo made. The police in *Escobedo* were unmistakably informed of their suspect's wishes; . . . Here, on the other hand, it is possible that the questioning officer took petitioner's remark not as a request that the interrogation cease but merely as a passing comment. Petitioner did not pursue the matter, but continued answering questions. . . ." *Frazier* v. *Cupp,* 394 U.S. 731, 739; 89 L.Ed.2d 1420, 1424–1425, *supra,* 22 Sup.Ct. 684, 693. This Court in *Frazier* affirmed the decision of the Court of Appeals which denied petitioner his petition for a writ of habeas corpus.

[3] *Escobedo* v. *Illinois,* 378 U.S. 478, 84 Sup.Ct. 1758, 12 L.Ed.2d 977 (1964).

However, in a post-*Miranda* case the Nebraska Supreme Court concluded that the defendant's statement, "Maybe I should talk to an attorney" did not invoke his right to counsel and thus affirmed the conviction. *State* v. *Irwin,* 214 N.W.2d 595, 604.[4]

(2) The second circumstance to be considered is the proffered telephone book. In the case before this Court after the respondent Voelpel made his statement concerning an attorney, the deputies attempted to offer a telephone book to the respondents. Neither respondent accepted this book.

In *State* v. *Irwin, supra,* after the defendant had made his statement, "Maybe I should talk to an attorney", the officer procured a telephone directory, opened it to the yellow pages under attorneys and handed it to the defendant. 214 N.W.2d 595, at 601. The defendant indicated he knew no attorneys but was reassured by the officer that they were all good. The officer left the room, but the defendant made no telephone call to an attorney. At a subsequent interrogation after being again advised of his *Miranda* rights but before speaking with an attorney, the defendant confessed to the crime. *State* v. *Irwin,* 214 N.W.2d 595, 601–602.

(3) The third factor to be considered in the instant case is the statement of the officers, "Have you reached any decisions". Petitioner contends that this question should not be considered interrogation, but

[4] See *contra* factually *Oregon* v. *Hass,* 420 U.S. 714, 43 L.Ed.2d 570, 95 S.Ct. 1215 (1975).

rather a request for clarification of the respondents' wishes.

In an analogous case the defendant was asked, "Do you want to either talk with a lawyer at this time, or to have a lawyer with you while we ask you questions. Do you understand?" *United States ex rel. Mealey* v. *State of Delaware,* 356 F.Supp. 473, 475 (1973). To that question defendant responded, "Yes". The court in *Mealey* rejected defendant's contention that the yes response indicated that he wanted an attorney since the question was so compound that the questioning officers could not have known to what the yes referred. 356 F. Supp. 473, 475–477. The Court then denied the Petition for a Writ of Habeas Corpus. 356 F.Supp. at 482.

In another analogous situation the defendant was arrested and after being advised of his rights indicated that he wished to be permitted to call his attorney. *United States* v. *Menichino,* 497 F.2d 935, 938 (5th Cir. 1974). He was told that he could call his attorney after his "biographical" was taken. The defendant agreed and though no questions concerning the crime were asked of him appellant volunteered several statements which were admitted at trial. Appellant then argued that the rights guaranteed by *Miranda* were not conditioned upon first filling out a "biographical". *United States* v. *Menichino, supra,* 497 F.2d 935, at 941. The court rejected the defendant's claim since the biographical questioning did not

"lend themselves to eliciting damaging statements about criminal activity". *United States* v. *Menichino, supra,* 497 F.2d 935, at 941. The Court then affirmed the conviction. 497 F.2d at 946.

Petitioner has been unable to find any case which includes all the pertinent facts existent in the instant case. However, the three circumstances mentioned above have individually provided sufficient reason for various courts to find a voluntary waiver of one's *Miranda* rights. A review of these cases and of the reasoning therein supports the propriety of the waiver in the instant case.

II. The Rights Afforded by *Miranda* May Not be Invoked by Another Against the Suspect's Wishes

The decision of the California Supreme Court in effect permits one suspect to invoke the right to silence and the right to counsel under *Miranda* that is personal to another suspect. This rule of law runs contrary to that long articulated by this Court.

In the case before this Court respondent Voelpel asked the officers, "Do you think *we* need an attorney?" (or alternatively "I guess *we* need a lawyer"). 15 Cal.3d 729, 732, ---- Cal.Rptr. ----, ----, ---- P.2d ----, ----, *supra.* Respondent Zolnay did not speak prior to the officers leaving the room. When the officers returned and asked whether respondents had reached any decision respondent Zolnay stated, "Well I cannot speak for Mr. Voelpel, but as for myself, I

would like to get this off of my conscience and that we did in fact commit the burglary." 15 Cal.3d 729, 732, ____ Cal.Rptr. ____, ____, ____ P.2d ____, ____, *supra*. The California Supreme Court concluded that Voelpel's use of the language "we" sufficed to invoke the right to counsel under *Miranda* for both respondents (15 Cal.3d 729, 736, ____ Cal. Rptr. ____, ____, ____ P.2d ____ ____). However, petitioner asserts that Zolnay's silence during the questioning over counsel and then his statement which limited the confession only to him and not to Voelpel is in effect a refutation of the California Supreme Court's interpretation of respondent Voelpel's statement. The record indicates that the officers did not understand respondent Voelpel to be invoking any privilege accorded under *Miranda* on behalf of respondent Zolnay (II RT 22).

This Court has long held that one's Fifth Amendment right against self-incrimination is personal and, hence, may not be invoked on behalf of any organization such as a corporation. *United States* v. *White,* 322 U.S. 694, 699, 88 L.Ed. 1542, 1546 (1944), 64 Sup.Ct. 1284, 1251.[5] The Fifth Amendment right against self-incrimination being personal in nature

[5] Accord see *United States* v. *Kordel,* 397 U.S. 1 8–9, 90 Sup.Ct. 763, 767 (1970); *Bell* v. *Maryland,* 378 U.S. 226, 263 (Appendix 1 to Opinion of Douglas, J.), 84 Sup.Ct. 1814, 1834 (1964); *U.S.* v. *Sherpix, Inc.,* 312 F.2d 1361, 1370 fn. 16, (Court of Appeal D.C. 1975); *Perial Amusement Corp.* v. *Morse,* 482 F.2d 515, 519 fn. 5 (2nd Cir 1973); *People* v. *Allen,* 41 Cal.App.3d 196, 202–203 fn. 4, 115 Cal.Rptr. 839, 843, ____ P.2d ____, ____ (1974).

should not be able to be invoked by a co-suspect absent some relationship or circumstance that indicates that the co-suspect is acting as the other's agent. Thus, the instance where an attorney invokes the right on behalf of his client would qualify as a relationship where the attorney acts as the agent of the suspect. Likewise, where a parent invokes the Fifth Amendment rights of a juvenile the relationship indicates that the parent is acting for the juvenile.

In the instant case no such relationship exists. The record does not disclose any relationship between the respondents which would permit an inference that respondent Voelpel were acting in the best interests of respondent Zolnay. In fact, the circumstances of the instant case indicate that respondent Zolnay did not intend for respondent Voelpel to speak in his behalf, but rather intended to be his own man. Thus, respondent Zolnay prefaced his confession with a disclaimer of its effect upon respondent Voelpel. Further, respondent Zolnay never participated in the dialogue between respondent Voelpel and the two officers while the four were in the room at the same time.

The circumstances of the instant case indicate that respondent Zolnay did not authorize respondent Voelpel to invoke Zolnay's right to silence and to counsel under *Miranda* and thus the California Supreme Court improperly concluded so.

CONCLUSION

Wherefore, the Petitioner concludes that this Court should reverse the decision of the California Supreme Court, hold that the petitioners did not interrogate the respondents after Voelpel's inquiry about his rights to counsel, and grant petitioner's writ of mandate to compel the Mono County Superior Court to permit use of Zolnay's confession.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General

JACK R. WINKLER
Chief Assistant Attorney General
Criminal Division

ARNOLD O. OVEROYE
Deputy Attorney General

MICHAEL FRANCHETTI
Deputy Attorney General

WILLARD F. JONES
Deputy Attorney General

PETER McBRIEN
Deputy Attorney General

APPENDIX A

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

THE PEOPLE, *Petitioner,* v. THE SUPERIOR COURT OF MONO COUNTY, *Respondent;* DONALD J. ZOLNAY *et al.*, *Real Parties in Interest.*	S.F. 23310 (Super. Ct. Nos. 4911 and 4912)

Defendants Donald J. Zolnay and Gunter E. Voelpel were charged in separate indictments with burglary (Pen. Code, § 459). The trial court granted defendants' motion to suppress both their confessions and evidence in the form of certain property recovered following the confessions. The People by petition for mandate seek review of that order. We conclude that the order was correctly entered, and accordingly deny the requested relief.

In March 1973 a cabin at a ranch resort in Mono County was burglarized. Sheriff's Deputies Wilmot and Strong began an investigation which led them to suspect that defendants had perpetrated the crime. They first interrogated Zolnay and Voelpel at Voelpel's motel room. In the course of this initial interview both defendants were advised fully of their constitutional rights as required by Miranda v. Arizona (1966) 384 U.S. 436. Both denied any involvement in the burglary.

Pursuant to their agreement, on the morning following the initial interrogation defendants appeared at the Mono County sheriff's substation for further questioning. During the next hour or hour and a half, they were fingerprinted and questioned separately. They were not again readvised as to their *Miranda* rights. When Deputy Wilmot told both defendants that he thought they were guilty, Zolnay did not respond, but Voelpel denied their guilt.

Wilmot and Strong then interviewed the defendants together in a single room and confronted them for the first time with some of the information they had gathered through their investigation. Both deputies then asserted to defendants that they thought defendants were guilty.

At this point, defendant Voelpel stated either "I guess we need a lawyer" or "Do you think we need an attorney?" (Voelpel's precise statement or inquiry is not clear and the record discloses varying accounts.) Deputy Wilmot answered affirmatively, adding that defendants had been advised the previous day of their right to counsel. Wilmot was then asked whether he could recommend an attorney. He answered that he could not, but advised the defendants that several local attorneys were listed in the telephone directory and suggested that they choose one to call.

Deputy Strong then repeated to defendants that he felt they were guilty and that the investigation would continue until the facts were determined. He said further that defendants could make the officers' jobs "easy" or "tough." Advising Zolnay and Voelpel to talk the matter over, the deputies then left them alone, with access to a telephone directory, for five or ten minutes.

When the deputies returned, they asked defendants

whether they had made any decisions. Zolnay responded, "Well, I cannot speak for Mr. Voelpel but as for myself I would like to get this off my conscience and that we did in fact commit the burglary . . . ." He said that he had been worried and upset, had discussed the situation with his wife the previous night, and had talked with Voelpel about returning the property.

Zolnay proceeded to describe the crime at length. Voelpel contributed details omitted by Zolnay. Written statements were subsequently taken. The defendants then accompanied the deputies to retrieve the property taken in the burglary from the place where the defendants had hidden it.

Defendants moved under Penal Code section 1538.5 to suppress the confessions. (Unless otherwise indicated, all references are to the Penal Code.) The trial court amended the motion to include suppression, as well, of the physical evidence seized following the confessions and granted the motion in its entirety. The People now ask us to issue a writ of mandate directing the trial court to vacate its order contending that the trial court had no power to order the confessions suppressed in proceedings conducted pursuant to section 1538.5, and that the physical evidence and the confessions were properly obtained.

We first consider the procedural issue raised by the People's contention that the trial court acted in excess of its jurisdiction in suppressing the confessions at a section 1538.5 hearing. Defendants initially moved to suppress only their confessions. As noted, the trial court, with defendants' consent, amended this motion. The People assert that a defendant may move under section 1538.5 to suppress only the products, tangible or intangible, of an unlawful search and seizure. They also argue that the trial court acted beyond its author-

ity in expanding defendants' suppression motion under section 1538.5 to include the physical evidence seized subsequent to the confession. The usual sequence of events is discovery of the contraband, then the confession. In the matter before us, this order was reversed.

The People's interpretation of the scope of section 1538.5 is correct for it provides for a motion to suppress only when there has been a search and seizure. (See People v. Superior Court (Smith) (1969) 70 Cal.2d 123, 128.) More recently in People v. Gale (1973) 9 Cal.3d 788, we described a motion under section 1538.5 as one "in the nature of a proceeding in rem against the evidence itself" which is directed "to the legality of specific items of evidence obtained by a search and seizure." (*Id.*, at p. 793.)

Several appellate court decisions have applied this general rule in situations similar to the one at hand. For example, in People v. Superior Court (Redd) (1969) 275 Cal.App.2d 49, the court distinguished between admissions or confessions which are the products of unlawful search and seizure and those which are not, reasoning that only if the admissions are unlawful "fruits" of an otherwise invalid search may they then be suppressed by means of a section 1538.5 motion. (See People v. Superior Court (Redd), *supra,* at pp. 50–52.) Similarly, evidence seized as a result of an unlawfully obtained admission or confession may be suppressed pursuant to a section 1538.5 motion. (See People v. Superior Court (Mahle) (1970) 3 Cal. App.3d 476, 484.) In both cases it is the unlawful seizure of tangible evidence, not the admission or confession, which permits a defendant to invoke the procedures authorized by section 1538.5. Thus, that statute can be properly employed only to shield a

defendant from Fourth Amendment violations; it has no part in protecting against Fifth Amendment infringements such as the one at hand.

Notwithstanding this limitation on the availability of section 1538.5, a defendant is not without means to seek pretrial review of alleged *Miranda* violations. Courts of this state have long recognized the existence of a common law motion to suppress illegally obtained statements. (See People v. Hill (1974) 12 Cal.3d 731, 765; Griffin v. Superior Court (1972) 26 Cal.App.3d 672, 696; Saidi-Tabatabai v. Superior Court (1967) 253 Cal.App.2d 257, 266.) However, this common law motion differs from a section 1538.5 motion in its effect in subsequent proceedings. Unlike the statutory motion to suppress, a ruling on the common law motion is not reviewable pretrial. (People v. Beasley (1967) 250 Cal.App.2d 71, 77.) Furthermore, it has been held in reference to common law suppression motions that "any ruling on the admissibility of an admission or confession made at such a motion is not binding on the court if the People again offer the evidence at the trial." (Saidi-Tabatabai v. Superior Court, *supra,* at p. 266; People v. Beasley, *supra,* at p. 77.)

In amplification of the People's assertion that the trial court exceeded its jurisdiction in amending the section 1538.5 motion, the contention is made that while at a common law suppression hearing such expansion may have been permissible, the language of section 1538.5 specifies that the "defendant" must make the motion, thus denying to the *court* the power to effect the amendment. Moreover, they argue that enlarging the target of the section 1538.5 motion after the hearing deprived the prosecution of the opportunity to present evidence which might have shown

that the evidence seized was not derived from the confession.

We conclude that the court's amendment was proper under the circumstances. The defense concurred in the court's action, and the discussions between counsel and the bench at the hearing on the motion clearly indicate that the suppression motion was intended to apply to all the evidence. Defendants correctly point out that the assistant district attorney specifically stated that he was not claiming surprise at the inclusion of the physical evidence, and the trial court indicated that it understood the original motion to include the physical evidence as well as the confessions. Of equal importance is the fact that the People have made no showing that they possessed any additional evidence indicating that the source of the physical evidence was other than the confession. The record discloses that the People have not been prejudiced by the trial court's action in this regard.

The physical evidence towards which the amended motion was directed was undeniably within the proper scope of section 1538.5. Since admissibility of the evidence depended upon whether or not a *Miranda* violation had occurred, a ruling on the *Miranda* issue necessarily became part of the section 153.5 hearing. While it is true that normally trial court rulings on admissibility of confessions are not reviewable pretrial and are not binding if the People offer the confessions in evidence at trial (see Saidi-Tabatabai v. Superior Court, *supra,* 253 Cal.App.2d 257 at p. 266; People v. Beasley, *supra,* 250 Cal.App.2d 71 at pp. 76–77), the particular circumstances presented by the matter at bench lead to a different result. Our review of the admissibility of the physical evidence, which we undertake in accord with the provisions of section 1538.5, necessarily requires that we make a determination as to whether or not the trial court was correct in holding that a *Miranda* violation has occurred. Our ruling on that issue then becomes the law of the case and must be adhered to by the lower courts in future proceedings in this action. (See People v. Shuey (1975) 13 Cal.3d 835, 8[illegible]–842.)

In connection with the substantive issues presented by the instant petition, we conclude that the defendants did invoke their *Miranda* rights, and that the confessions procured during the subsequent interrogation were improperly obtained and thus inadmissible.

Defendant Voelpel's question, "Do you think we need an attorney?" (or alternatively his statement "I guess we need a lawyer") was a direct result of the interrogation. The record discloses that the query interrupted the interrogation at a point when defendants' choice seemed all but limited to confession or silence. Moreover, defendants' subsequent specific request that the deputies recommend an attorney indicates both their continuing concern and their specific and pointed desire to consult counsel. We think the record discloses sufficient invocation of their right to remain silent. The *Miranda* mandate on the point is broad. After reciting the procedural safeguards, the high court said "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently. If, however, he indicates *in any manner and at any stage* of the process that he wishes to consult with an attorney before speaking there can be no questioning . . . . The mere fact that he may have answered some questions or volunteered some statements on his own does

not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." (Miranda v. Arizona, *supra,* 384 U.S. 435 at pp 444–445, italics added.)

We have previously considered the meaning and effect of the phrase, "in any manner," in the *Miranda* holding. We have observed, for example, that a suspect need not make an express statement that he wishes to invoke his Fifth Amendment privilege; "no particular form of words or conduct is necessary." (People v. Randall (1970) 1 Cal.3d 948, 955.) Furthermore, "to demand that it [the privilege] be invoked with unmistakable clarity (resolving any ambiguity against the defendant) would subvert *Miranda's* prophylactic intent." (*Id.*) In the instant case, Voelpel's question concerning the need for counsel, and the deputy's affirmative answer, or alternatively Voelpel's statement that "I guess we need a lawyer" constitutes in our view ample evidence that the defendants had invoked their Fifth Amendment rights. While Officer Strong asserted that he understood the question as demonstrating concern about the need for counsel *in the future*, the record discloses the interest was more immediate. As previously noted, the discussion regarding an attorney interrupted the interrogation at a critical juncture and included a request that the deputies recommend a lawyer at the time the request was made.

We find no significance in the fact that *both* defendants rely upon Voelpel's statements to the officers as constituting an invocation of their Fifth Amendment rights under *Miranda.* It is apparent that they were interrogated jointly and that the officers'

questions regarding their desire to speak with or to consult an attorney were addressed to both. In the absence of evidence to the contrary we can only presume, given the setting, that Voelpel was speaking for both, and that his words were intended to serve as an assertion of Zolnay's rights as well as his own.

Our determination that the defendants' question constituted a valid invocation of their Fifth Amendment privileges does not end our inquiry. A suspect who has asserted his rights and prevented further lawful interrogation nonetheless retains the option, thereafter, voluntarily to initiate a confession. (See People v. Fioritto (1968) 68 Cal.2d 714, 719.) The People argue that even if Voelpel's question is deemed an implicit exercise of Fifth Amendment rights, the subsequent confessions should be viewed as independent and volunteered.

This assertion too is unsupported by the facts. Zolnay's confession was not spontaneous. It was offered after the deputies had left the defendants for five to ten minutes with the message that defendants could make the officers' jobs "easy" or tough." Furthermore, the deputies asked, upon returning to the room, whether the defendants had made any decisions. In People v. Fioritto, *supra,* 68 Cal.2d 714 at page 720, we emphasized that "[t]he form of the renewed queries, however subtle or gentle, cannot be considered in determining whether there has been a violation of the stern principles prescribed by the Supreme Court in *Miranda.*" In the present case, both the deputies' assertion that defendants could make their jobs easy or tough, and their question whether defendants had reached a decision, demonstrate that defendants' confessions were elicited by police questioning after de-

fendants had asserted their *Miranda* rights. In combination, the police conduct demonstrates a *Miranda* violation which invalidates the confessions.

The alternative writ of mandate is discharged and the petition for a peremptory writ is denied.

RICHARDSON, J.

WE CONCUR:

WRIGHT, C. J.
McCOMB, J.
TOBRINER, J.
MOSK, J.
SULLIVAN, J.
CLARK, J.

APPENDIX B

CERTIFIED FOR PUBLICATION

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT (Mono)

THE PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner,* v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF MONO, *Respondent,* DONALD J. ZOLNAY and GUNTER E. VOELPEL, *Real Parties in Interest.*	3 Civil 15005 (Sup. Ct. Nos. 4911 and 4912)

MODIFICATION OF OPINION

BY THE COURT:

The opinion of this court filed April 29, 1975, in the above entitled case is modified as follows: On page 2, line 8, delete the following four words "the main lodge in." The sentence should now read "So far as here relevant, it appears that a cabin at a ranch resort in Mono County, closed for the winter, was burglarized during a three-day period ending on the morning of March 17, 1973." *(CERTIFIED FOR PUBLICATION.)*

FOR THE COURT:

REGAN, Acting P.J.
EVANS, J.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT (Mono)

THE PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner,* v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF MONO, *Respondent,* DONALD J. ZOLNAY and GUNTER E. VOELPEL, *Real Parties in Interest.*	**3 Civil 15005** (Sup. Ct. Nos. 4911 and 4912)

The People petition for writ of mandate directing that respondent court annul its order suppressing oral and written admissions and confessions made by the real parties in interest, Zolnay and Voelpel (hereinafter defendants), and annul its order suppressing all evidence of contraband seized by sheriff's officers after the making of the incriminating statements. The order of suppression was made under the authority of section 1538.5 of the Penal Code.

The defendants in this proceeding are charged in separate indictments with burglary. The motion to suppress was submitted to the respondent court on the reporter's transcripts of the preliminary examination and the grand jury hearing as well as on evidence produced at the hearing on the motion. There does not

appear to be any conflict in the evidence. So far as here relevant, it appears that a cabin at a ranch resort in Mono County, closed for the winter, was burglarized during a three-day period ending on the morning of March 17, 1973. Physical investigation in the area of the burglary by Deputy Sheriff Wilmot disclosed tracks of a ski-boose snowmobile towing a toboggan in the snow. The tracks led from the ranch to an old pump house near the Owens River and from there to a canyon. Deputy Wilmot was joined by Deputy Strong in the investigation. A game warden in the area advised Wilmot that he had seen a ski-boose with a toboggan in it parked at the pump house on March 16. A snowmobile dealer in Mammoth Lakes advised the deputies that defendant Voelpel owned a ski-boose and that both defendants had been seen riding on it in the general area of the ranch on March 16. Deputy Strong interviewed defendant Voelpel on March 18 at the motel where Voelpel resided. Voelpel admitted owning a snowmobile, that he and defendant Zolnay had been riding on it in the Owens River area on March 16 and that they had stopped at the pump house on that date to pick up gas cans. On March 18, both deputies went to Voelpel's motel and found both defendants in the garage area. Deputy Wilmot informed the defendants that they were investigating the burglary of the ranch resort and wished to talk to them about their having been in the area at the time of the burglary. Voelpel, in response to questions, acknowledged ownership of the ski-boose and that he and Zolnay had been riding it in the vicinity of the burglarized ranch but denied any complicity in the burglary. Both defendants, however, denied owning a toboggan. Following their initial contact, the deputies and the defendants went to the motel lobby where

Deputy Wilmot informed each of them of their *Miranda* rights.[1] Deputy Strong asked the defendants whether they were positive that they understood each of the rights and received an affirmative response. Each defendant indicated he wished to discuss the matter further with the deputies. The defendants described to the deputies the route they had followed on the ski-boose to the pump house in the nearby canyon on March 16 and indicated that they had been within 200 yards of the ranch lodge but denied having gone to the lodge itself. They again denied owning a toboggan. Deputy Wilmot asked both defendants to come to the sheriff's substation for fingerprinting. It was agreed that each defendant would do so the next morning, March 19, at 10:00 o'clock.

After the interrogation at the motel, Deputy Wilmot interviewed a witness who had seen a person matching Zolnay's description on a ski-boose with a toboggan in the Owens River area on March 16.

Upon arrival at the sheriff's substation on March 19, the deputies spent an hour and a half fingerprinting and interrogating the defendants separately. The defendants were not again advised of any *Miranda* rights at that time. During the interviews, Deputy Wilmot stated to each defendant he thought they were guilty, and that they had taken a toboggan with them on the March 16 ride. Defendant Zolnay made no response to the statement, and Voelpel denied their guilt. After the separate interviews, the deputy brought the defendants into the same room, accused them jointly of guilt, and confronted them for the first time with the report of the game warden and the witness who had seen the ski-boose, the toboggan, and a person matching Zolnay's description. The officers

[1] Miranda v. Arizona (1966) 384 U.S. 436.

indicated the defendants should make a voluntary statement and admit their guilt.

Defendant Voelpel then said, "I guess we need a lawyer" and asked Deputy Wilmot, "Do you think we need an attorney?" Deputy Wilmot responded affirmatively that defendants did, in fact, need an attorney and reminded the defendants they had been advised the day before that they had a right to an attorney. Deputy Wilmot was asked whether he could recommend an attorney for the defendants to contact. Wilmot responded in the negative, but advised them there were numerous local attorneys in the telephone directory, and they could make a call and select any one of them. A telephone book and a telephone were provided the defendants in the interrogation room. The officers told the defendants they would leave the room, and further advised them to talk the matter over between themselves and come to a decision. As the deputies were leaving, Deputy Strong remarked to the defendants that he thought they were guilty and the investigation would continue until the facts had been determined. It was indicated that the defendants could make the officers' task "easy" or "tough," depending on whether or not they wished to make admissions. The deputies departed, closed the door, and left the defendants alone in the interrogation room for five or ten minutes. The deputies reentered the room and asked if the suspects had made any decision. Zolnay said, "well, I cannot speak for Mr. Voelpel but as for myself I would like to get this off of my conscience and that we did in fact commit the burglary. . . ." Zolnay stated that he had been unable to sleep, was upset by the situation, and had discussed it with his wife the night before. Zolnay further stated that he had discussed with Voelpel returning the

property. Zolnay described in detail how the crime occurred. During Zolnay's recitation of the events at the time of the burglary, Voelpel contributed details omitted by Zolnay. Defendants did not refuse to talk nor did they request an attorney be present.

On the following day, on the basis of the information provided by the confessions and admissions, the sheriff's deputies, accompanied by defendants Zolnay and Voelpel, recovered the stolen items from their cache in the snow where they had been hidden.

MOTION TO SUPPRESS THE CONFESSIONS AND THE RECOVERED PROPERTY PURSUANT TO PENAL CODE SECTION 1538.5

The defendants moved under the provisions of section 1538.5 to suppress the recovered property as evidence and their admissions and confessions of guilt to the burglary. The respondent court granted the motion and suppressed the admissions and confessions on the ground they had been obtained in violation of *Miranda* (People v. Randall (1970) 1 Cal.3d 948, 958; People v. Ireland (1969) 70 Cal.2d 522, 537; People v. Fioritto (1968) 68 Cal.2d 714, 719), and also suppressed all physical evidence seized as a result of the inculpatory statements. (People v. Superior Court (1970) 3 Cal.App.3d 476, 483–484.) Petitioner makes no contention that the defendants were not subjected to a custodial interrogation at the sheriff's substation (Miranda v. Arizona, supra; People v. Fioritto, supra), nor is it asserted by defendants that the *Miranda* warnings given on the day prior to the making of the confession and admission, and the acknowledgment by defendants that they understood the rights were no longer operative. (People v. Schenk

(1972) 24 Cal.App.3d 233, 236; People v. Brockman (1969) 2 Cal.App.3d 1002, 1006.) It is the contention of the petitioner, however, that a violation of *Miranda* was not shown, that defendants neither demanded nor requested that an attorney be present, nor did they indicate they wished to remain silent. The court in *Miranda* said, "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." (Fn. omitted.)

The court in People v. Burton (1971) 6 Cal.3d 375, at 381–382 stated: "In cases where the suspect makes no express assertion, the crucial question is what behavior is necessary to constitute an invocation of the Fifth Amendment privilege. We have stated several times that no particular form of words or conduct is necessary to constitute such an invocation. 'A suspect may indicate such a wish in many ways.' [Citation.] 'To strictly limit the manner in which a suspect may assert the privilege, or to demand that it be invoked with unmistakable clarity (resolving any ambiguity against the defendant) would subvent *Miranda's* prophylactic intent.' [Citation.] [¶] *Any words or conduct which 'reasonably appears* [*sic*] *inconsistent with a present willingness on the part of the suspect to discuss his case freely and completely with police at that time . . .' [citation] must be held to amount to an invocation of the Fifth Amendment privilege.*" (Emphasis in original and emphasis added.)

While this court must view the evidence on a 1538.5 motion in the light most favorable to the trial court's order, we also cannot ignore the well-established rule that our function is to determine whether substantial evidence supports it. (Lorenzana v. Superior Court (1973) 9 Cal.3d 626, 636.)

We conclude that defendant Voelpel's inquiry of Deputy Wilmot, "Do you think we need an attorney" cannot be construed as an invocation of a demand for an attorney and of the Fifth Amendment right to be silent. Such request is not "inconsistent with a present willingness on the part of defendants to freely and fully discuss the case with the deputy." (People v. Burton, supra, 6 Cal.3d at p. 382.) Neither *Miranda* nor *Burton* holds that a suspect manifests the desire to remain silent when he seeks information to aid him in deciding whether to remain silent. This court in People v. Watkins (1970) 6 Cal.App.3d 119, 122, held that where the defendant asks the interrogating officer "how he could get an attorney" was not a demand that the questioning cease and that he be permitted to remain silent. It is without question that if the individual states that he wants an attorney, the interrogation must cease until an attorney is present. (Miranda v. Arizona, supra.) The duty to cease questioning only commences, however, upon an indication from the defendant that he wishes to invoke his Fifth Amendment privileges. If the defendant is willing to discuss his case fully with police officers after having been taken into custody and advised of his rights, *Miranda* imposes no constitutional inhibition to continued questioning. Defendant Voelpel attempted to convince the court that his statement that he "guessed" they needed a lawyer was an invocation of the right to remain silent. We hold to the contrary.

This was a mere verbalization of the defendant's effort to make up his mind on whether or not to secure an attorney or remain silent. We find no assertion by the defendants of a desire to invoke their Fifth Amendment privilege, to consult with counsel prior to or during questioning. There is no evidence that the defendants desired custodial interrogation cease nor did they request an attorney be present prior to further interrogation. The record reflects only the query from the defendant to the officers, "Do you think we need an attorney?" We cannot hold this sufficient to invoke the *Miranda* inhibition against continued questioning or the Fifth Amendment privilege to remain silent.

Although not directly asserted by the defendants, it is noted by the court that the *Miranda* warning was given once on March 18, and no subsequent warning or readvisement made to the defendants. The law does not require that a defendant be readvised of his rights prior to each separate interrogation. (People v. Brockman, supra, 2 Cal.App.3d 1002, 1006; People v. Long (1970) 6 Cal.App.3d 741.)

A confession or statement is voluntary when it is the product of a rational intellect and a free will. (Davis v. North Carolina (1966) 384 U.S. 737, 739.) In inquiring into the voluntariness of a defendant's confession or admission, the court must examine the totality of circumstances surrounding the state's conduct. Factors such as the length of questioning, the nature of the questions, the conduct of the authority, as well as the conduct of the defendants, are all relevant in determining whether the accused's free will was overborne. (People v. Stewart (1965) 62 Cal.2d 571, 579.)

Defendant Zolnay's comments that "I would like to get this off my conscience and that we did in fact commit the burglary . . . " and that he had been unable to sleep, was upset by the situation and had discussed the matter with his wife the night previously indicate strong motivation for the statement and support our conclusion that the confessions and admissions were voluntarily given. We conclude there was no *Miranda* violation.

Petitioner has also contended that although California decisional law permits common law pretrial motions to suppress admissions and confessions allegedly obtained in violation of *Miranda* (Griffin v. Superior Court (1972) 26 Cal.App.3d 672, 696; Saidi-Tabatabai v. Superior Court (1967) 253 Cal.App.2d 257), the 1538.5 motion made by defendants was not a proper remedy for suppression of the statements. (People v. Superior Court (1969) 275 Cal.App.2d 49.) Petitioner further contends that respondent court erroneously suppressed evidence of the stolen goods recovered after defendants had confessed, inasmuch as the 1538.5 motion did not designate the items at the time the motion was made. The court, on its own initiative, amended the motion to include the stolen items after defense argument for such suppression was made in points and authorities filed after the evidentiary hearing. These additional questions need not be reached since our conclusion on petitioner's first contention (no *Miranda* violation) is dispositive of the petition.

Let a peremptory writ of mandate issue ordering the respondent, Superior Court of the State of California, in and for the County of Mono, to vacate its suppression order issued on December 11, 1974, in Mono County Superior Court actions No. 4911 (People v. Donald J. Zolnay) and No. 4912 (People v. Gunter E. Voelpel), and further directing respondent court to enter an order denying the joint motions to suppress. The temporary stay of trial of the actions is ordered terminated upon service of the peremptory writ.

EVANS, J.

We concur:
FRIEDMAN, Acting P.J.
REGAN, J.

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF MONO

Court convened at 1:40 p.m., December 11, 1974, Hon. Harry R. Roberts, Judge; Helen B. Pace, Deputy Clerk; Fred Getty, Deputy Sheriff, and the following proceedings were had:

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff,* vs. DONALD J. ZOLNAY and GUENTER VOELPEL, *Defendants.*	No. 4911 and 4912

1538.5 Motion.

Appearances:

Donald J. Zolnay, Defendant; Don L. Chapman, Attorney at Law, for the Defendants; David M. Kennedy, Assistant District Attorney, for the People.
Defense counsel stated that Mr. Voelpel was not present, having signed a waiver for his appearance.
Defense argued.
People argued.

By the Court:

"Hereby order, and is the order of this Court, that all oral admissions obtained from defendants or either of them on Monday, the 19th of March, made from and after point of interrogation in which defendants, or either of them, inquired of Officer Strong, "do you think we need an attorney", any and all written con-

fessions made by defendants thereafter "do you think we need an attorney", are hereby suppressed together with any and all evidence contraband seized by the officers after the making of said oral admission and said written confessions."

By the Court:

"Hereby find that the defendants had made categorical demand for an attorney. Demand as such was known and so understood by the officers. Motion granted."

Adjourned, 3:30 p.m.

The foregoing instrument is a full, true and correct copy of the original on file in this office.

Attest January 2, 1975
ANN M. WEBB, County Clerk and Clerk of the Superior Court, of the State of California, in and for the County of Mono.

By Helen B. Pace, Deputy

APPENDIX D

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102
January 14, 1976

I have this day filed Order ----------

DOCKETED

SACRAMENTO
No. 75 PW 0001
Date 1/19/76 By A.G.

REHEARING DENIED

In re: S.F. *No.* 23310

People
vs.
Superior Court, Mono

Assigned Crim.
Case Docket # 75 PW 0001
Send To: McBrien

G. E. BISHEL
Clerk

APPENDIX E

§ 459. Definition

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, trailer coach as defined by the Vehicle Code, vehicle as defined by said code when the doors of such vehicle are locked, aircraft as defined by the Harbors and Navigation Code, mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.

APPENDIX F

§ 995. Cases in which indictment or information must be set aside

The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

If it be an indictment:

1. Where it is not found, endorsed, and presented as prescribed in this code.

2. That the defendant has been indicted without reasonable or probable cause.

If it be an information:

1. That before the filing thereof the defendant had not been legally committed by a magistrate.

2. That the defendant had been committed without reasonable or probable cause.

APPENDIX G

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF MONO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
vs.
DONALD J. ZOLNAY
Defendant(s)

No. 4911
Criminal
Indictment
A True Bill
Section 459 of the Penal Code, Laws of the State of California

The Grand Jury, County of Mono, State of California, hereby accuses Donald J. Zolnay of a felony, to wit: Violation of Section 459 of the Penal Code of the State of California, being the entering of a building with the intent to commit theft, in that on or about the 16th day of March, 1973, in the County of Mono, State of California, and within the Mono Judicial District of said County, he did wilfully and unlawfully enter a building, to wit: Alpers' Ranch Main Lodge and outbuilding, Cabin #2, located at Alpers' Owens River Ranch, county and state aforesaid, with the intent then and there and therein unlawfully and feloniously to commit a felony and theft.

All of which is contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California.

This TRUE BILL OF INDICTMENT is found on August 31, 1973, by the Grand Jury of Mono County acting as a Grand Jury in Mono County.

A TRUE BILL

COY I. ZIGLAR
Foreman of the Grand Jury of the County of Mono, State of California

N. EDW. DENTON
N. Edward Denton, District Attorney of the County of Mono, State of California

Names of witnesses examined before the Grand Jury on finding the foregoing Indictment:

Charles W. Strong, Deputy, Mono County Sheriff's Department
Harley Wilmot, Deputy, Mono County Sheriff's Department
William Alpers

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF MONO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
vs.
GUNTER E. VOELPEL
Defendant(s)

No. 4912 Criminal Indictment

A True Bill Section 459 of the Penal Code, Laws of the State of California.

The Grand Jury, County of Mono, State of California, hereby accuses Gunter E. Voelpel of a felony, to wit: Violation of Section 459 of the Penal Code of the State of California, being the entering of a building with the intent to commit theft, in that on or about the 16th day of March, 1973, in the County of Mono, State of California, and within the Mono Judicial District of said County, he did wilfully and unlawfully enter a building, to wit: Alpers' Ranch Main Lodge and outbuilding, Cabin #2, located at Alpers' Owens River Ranch, county and state aforesaid, with the intent then and there and therein unlawfully and feloniously to commit a felony and theft.

All of which is contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California.

This TRUE BILL OF INDICTMENT is found on August 31, 1973, by the Grand Jury of Mono County acting as a Grand Jury in Mono County.

A TRUE BILL

COY I. ZIGLAR
Foreman of the Grand Jury of the County of Mono, State of California

N. EDW. DENTON
N. Edward Denton, District Attorney of the County of Mono, State of California

Names of witnesses examined before the Grand Jury on finding the foregoing Indictment:

Charles W. Strong, Deputy, Mono County Sheriff's Department
Harley Wilmot, Deputy, Mono County Sheriff's Department
William Alpers

APPENDIX H

IN THE SUPERIOR COURT IN AND FOR THE COUNTY OF MONO STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff,* vs. DONALD J. ZOLNAY and GUNTER E. VOELPEL, *Defendants.*	No. 4911 and 4912

MEMORANDUM OPINION

Defendants move to dismiss the indictment pursuant to Section 995 Penal Code upon the ground that defendants have been denied due process of law by reason of the fact that they are charged by the indictment with the identical offense for which they were earlier charged by an information which information the Court earlier dismissed. The due process argument will be later expanded upon in more detail. Defendants contend that Section 999 Penal Code is unconstitutional *as applied to the facts of this case.* Defendants do not contend that Section 999 is unconstitutional on its face and candidly admit that there well may be, and in fact are, cases where Section 999 is perfectly constitutional, as for example where there is newly discovered evidence to support the subsequent information or indictment or where the unavailability of a material witness required the earlier dismissal of the first proceeding either at the preliminary hearing or later at the Superior Court level because of the insufficiency of the evidence. The gravamen of defendants' contention is that Section 999 sanctions success-

sive prosecutions for the same offense without any requirement for showing of the necessity or reason for such successive prosecutions thereby making Section 999 vulnerable to a due process attack when the subsequent prosecution is predicated upon substantially the identical facts, all of which were known and available to the prosecution or law enforcement at the time of the earlier prosecution. The facts will put the defendants' argument in clearer perspective.

Defendants were originally arrested upon a complaint filed March 19, 1973, charging them with a felony, to wit: a burglary under Section 459 Penal Code. A preliminary hearing was held on May 8, 1973, and the defendants were bound over to the Superior Court. On May 9, 1973, an Information was filed in the Superior Court charging the defendants with the felony. Defendants were arraigned on a plea of not guilty to a crime of burglary in the second degree. At the time of the arraignment, defendants moved to dismiss, under Section 995 Penal Code. On July 18, 1973, the Court rendered a memorandum opinion and placed the order of dismissal upon the ground that the defendants' admissions and confessions made and taken at the time of the investigation were void under the *Miranda* rule. No review was sought by the prosecution challenging this ruling. Thus terminated what may be described as the first prosecution of the defendants. Thereafter, the prosecution presented substantially the same evidence, with one exception, to the Grand Jury. The prosecution called substantially the same witnesses as were called at the time of the preliminary hearing in the first proceeding. The Grand Jury returned an indictment charging the defendants with burglary for the same offense as embraced in the first proceeding. However, this single

exception is most material in that the additional evidence coming before the Grand Jury overcame and obviated the *Miranda* problem which had terminated the first proceeding. Defendants waived their right to a speedy trial in the second proceedings. We will now turn to the precise nature of the *Miranda* problem as shown in the face of the preliminary transcript.

The Court's ruling dismissing the first proceeding, was predicated upon the ground that during the course of the defendants' interrogation at the Sheriff's substation, the defendants demanded that they be afforded the opportunity to consult and be represented by counsel, and that not withstanding this demand, it *appeared* from the face of the Preliminary Transcript that the officers persisted in the interrogation resulting in incriminating admissions by the defendants and a written confession of guilt. The gravamen of the ruling dismissing the first proceeding was that upon such demand for counsel, all interrogation must cease until such time as the defendants had been afforded the opportunity to confer with counsel. In ruling that the admissions and confession were illegally obtained evidence, the Court was limited to the evidence shown within the four corners of the Preliminary Transcript. There was nothing in the transcript that showed that the defendants ever retracted their demand for counsel, or waived their rights. A full *Miranda* warning had been administered to the defendants the day before the damaging admissions were made. When the defendants were indicted for the same offense, the transcript before the Grand Jury showed that the defendants voluntarily retracted their demand for counsel. In other words, the additional evidence in the Grand Jury transcript showed

that immediately following the demand for counsel, the officers suspended their interrogation; provided the defendants with a telephone book; mentioned the names of two or three attorneys in the area, without the specific recommendation of any attorney; stated that the defendants should talk it over between themselves and decide what they wanted to do; made the use of a telephone available to the defendants, and thereupon departed and left the defendants alone in the room. The officers returned to the room in about ten minutes and asked the defendants if they were ready to further discuss the matter. Defendant Zolnay immediately replied that he could not speak for Defendant Voelpel, but he wished to clear his conscience because he had not been able to sleep all night, but that he had, in fact, committed the burglary. The defendants at no time from the point of the officers' re-entry into the room, reiterated their prior demand for an attorney. The officers requested Defendant Zolnay to give them the details of the crime, which he did. Thereupon, as Defendant Zolnay in the presence of Defendant Voelpel related the activities of himself and Mr. Voelpel at the scene of the crime, Defendant Voelpel from time to time joined in Defendant Zolnay's narration, adding or clarifying details, thereby implicating himself. After making these verbal statements, both defendants signed written confessions which again were signed without further or any demand for counsel. Probable cause is abundantly established by the defendants' admissions and confession. Thus, the facts showing the retraction of the demand for counsel were well known to the very officers who testified in the preliminary hearing in the first proceedings, but those facts were

not somehow brought out during the preliminary hearing. However, they were brought out in testimony before the Grand Jury in the second proceedings.

Defendants' attack the constitutionality of Section 999 Penal Code *as applied to the facts of this case* on the ground that a second prosecution for the same offense operates to unreasonable and unnecessarily subject them to oppressive additional expense for counsel fees incurred in the dismissal of the first proceeding, additional bail expense and continued mental anguish endured during the pendency of two successive proceedings for the same offense, all contrary to the guaranty of due process, where: (1) the second prosecution is not based upon newly discovered evidence; (2) the second prosecution is in fact based upon the same facts well known to the law enforcement at the time of the preliminary hearing in the first prosecution; and (3) where there is no showing of any reason why second prosecution was really justified except to cure the blunders of law enforcement or the prosecution in the first prosecution. Defendants' argue that Section 999 is unduly broad and favorable to the prosecution in permitting after a dismissal, successive felony prosecutions for the same offense and that there should be some limitations, express or implied, upon this power or otherwise the power to prosecute is equated with the power to persecute. Defendants complain that the statute gives the defense no margin for blunder or error and that the defense must play for "keeps" by such decisions as to whether to cross-examine the people's witnesses or whether to summon additional witnesses. Defendants further argue that such successive felony prosecutions in these circumstances operate to to deny to

a defendant the right to counsel by imposing too heavy a financial burden upon the defendant.

A constitutional attack upon Section 999 Penal Code, is indeed an ambitious project. The dips, spurs and angles of the same due process argument are equally applicable to invalidate not only Section 999 Penal Code, but also Section 1387 Penal Code (sanctioning successive felony prosecutions for the same offense resulting from a denial of the right to a speedy trial), Section 1496 (sanctioning successive prosecutions for the same offense after discharge on a writ of habeas corpus) and Section 1538.5(j) (sanctioning successive prosecutions for the same offense where illegally obtained evidence has been suppressed). An unbroken line of authority in this state has upheld such successive felony prosecutions for the same offense after a dismissal either at preliminary hearing or in the Superior Court. (People v. Uhleman (1973) 9C 3d 662; People v. Mason (1968) 259CA 2d 30; People v. Reeves (1967) 250CA 2d 490; People v. Snowdy (1965) 236CA 2d 677; People v. Combes (1961) 56C 2d 135; People v. Prewitt (1959) 52C 2d 330; People v. Ferrera (1957) 149CA 2d 850; Badillo v. Superior Court (1956) 46C 2d 269; People v. Hatfield (1933) 129CA 162; People v. Dawson (1930) 210C 366; People v. Breen (1900) 130C 72). In California and by the weight of authority even a dismissal of the first prosecution because of a denial of the right to a speedy trial is no bar to another felony prosecution for the same offense, thereby reducing the right to a speedy trial to an illusion of an equal dignity if a fairy tale (People v. Godlewski (1943) 22C 2d 677; Anno. "Effect of dismissal if original indictment or information with subsequent re-indictment or information

under statute implementing right of accused to speedy trial." 30 ALR 2d 462).

Defendants' due process argument not only challenges a number of our Penal Code sections and the California decisions uniformly to the contrary, but also challenges numerous Federal decisions upholding successive prosecutions for the same offense after a *nolle prosequi* and dismissal under Rule 48 of the Federal Rules of Criminal Procedure (U.S. v. Chase, CA4, 1967, 372F 2d 453, cert. denied 18L Ed 2d 626; Mann v. U.S., CADC, 1962, 304 F2d 394, cert. denied 9L Ed 2d 127, Spriggs v. U.S., CA9, 1955, 225 F2d 865, cert. denied 100L Ed 830; Dortch v. U.S., CA6, 1953, 203 F2d 709, cert. denied 98L Ed 342; U.S. v. Manetti, D.C. Del., 1971, 323F Supp. 683).

> "A dismissal properly taken under Rule 48(a) is without prejudice, and within the period if the statute of limitations, a second indictment or information may be brought on the same charge."
>
> Wright, *Fed. Proc. & Prac.*, V3, Sec. 811

The only difference between the Federal decisions and the California law is that where the dismissal of the first prosecution is upon the ground of denial of the right to a speedy trial, the dismissal is a bar to a second prosecution (see Mann v. U.S., supra.).

> "Often of course, the second prosecution, if permitted, would stumble on Due Process Clause of the Fifth Amendment for the original dismissal is usually accompanied by a finding that, because of the lapse of time and the resulting prejudice to defendant's case, he can no longer obtain a 'fair trial' . . . but, without a rule barring re-indictment. the speedy trial clause would not fulfill its promise in those cases where the government has

been guilty of purposeful and oppressive delays which, however, do not absolutely preclude an eventual fair trial."

Mann v. U.S., CADC, 1962, 304 F 2d 394, 397, Ftnt 7.

Even a refiling by the prosecution with the intent and purpose to deprive defendant of the fruits of his labors and efforts expended in the first prosecution appears not to constitute harassment or oppression (Parr v. U.S., 1956 351 U.S. 513, 100L Ed 1877). In *Parr supra,* defendant was indicted at Corpus Christi and because of his political prominence he moved for a change of venue to Laredo to assure a fair trial. The District Court at Corpus Christi granted the motion and ordered the trial to be held at Laredo. The government was dissatisfied with the ruling and, to defeat the change of venue, again had the defendant indicted for the same offense in Austin, and thereupon, caused the proceeding which had been transferred to Laredo to be dismissed. The defendant appealed from the dismissal upon the ground that he had a right to be tried in Laredo, a place where the Court had determined he could be assured a fair trial. The Supreme Court held (5-4) that the order of dismissal was not appealable and in any event the defendant was not aggrieved thereby. As to the additional expense and protracted mental anguish endured as a result of the second prosecution, the Court said:

> "True, the petitioner will have to hazard a trial under the Austin indictment before he can get a review of whether he should have been tried in Laredo under the Corpus Christi indictment, but bearing the discomfiture and cost of a prosecution for crime, even by an innocent person, is one of

> the painful obligations of citizenship", Cobbledick v. U.S., supra, (309 U.S. at 325)."
>
> Parr v. U.S., supra, (100L Ed 1377, 1384)

A close parallel to the case at bar is U.S. v. Manetti, DC Del (1971) 323 F Supp. 683. In *Manetti* the defendant made precisely the same arguments as do the defendants of the case at bar. In *Manetti*, defendants were first indicted upon evidence obtained by a search warrant. Defendants moved to suppress the evidence on the ground that it was illegally obtained and the motion was granted. Apparently, there was insufficient evidence remaining to hold the defendant to answer. The government, thereupon, sought a new indictment, presented to the Grand Jury the rest of the evidence and obtained a second indictment for the same offense. Thereupon, the first indictment was dismissed.

> "Defendants' second argument is grounded upon the assertion that, having gone to the expense and having endured the mental anguish of defending the first prosecution, they should not be required to defend another."
>
> Manetti v. U.S., supra, p. 691.

> "The problems with defendants' second contention on its merits are (1) that the government's action in that case clearly does not rise to the level of harassment and, (2) that defendants have not even been substantially prejudiced by the dismissal of the original indictment. The government commenced the first prosecution with evidence which was subsequently suppressed. That evidence had been presented to the Grand Jury in the first proceeding. After this Court determined that this evidence had been obtained in violation of defendants' constitutional rights, the government, while

convinced that it was not legally required to do so, decided that the safest and fairest course would be to place before the Grand Jury the remaining evidence which it then had in order to determine if that evidence alone would be found to constitute probable cause for prosecution . . . . . When a new indictment was secured upon 'untainted' evidence, dismissal if the previous indictment was sought."

"I believe the above recited facts are sufficient to demonstrate that there has been no intent to harass the defendants. Moreover, it does not seem to me they have lost the fruits of their prior efforts. The proceedings in the first case consisted almost entirely of the proceedings on defendants' motion to quash the search warrants and suppress the evidence obtained thereby. Defendants were successful and the evidence has been suppressed. It will not be available for use by the government at the trial on the new indictment."

Manetti v. U.S., supra., p. 692.

It is doubtful that either Section 999 Penal Code or Section 1387 Penal Code mean literally what they say. In other words, neither of these sections place any conditions or limitations upon the power of the prosecution to refile for the same offense. There are occasional intimations in some of the cases that there is an implied limitation upon the power to refile, namely, where the defendant is subjected thereby to harassment or oppression. Just what constitutes "harassment or oppression", the dicta in these cases does not teach us. There can be no doubt that repetitive prosecutions for the same offense motivated by malice on the part of the prosecution may well by

their number and the underlying improper motive be sufficient for the Courts to step in and bar further prosecution either upon the principle that enough is enough, or to dismiss too much in the interest of justice. This Court entertains the opinion that notwithstanding the blanket license to refile for the same offense contained in the language of Section 999 Penal Code, that there are implied limitations and conditions protecting a defendant from an infinite number of prosecutions for the same offense without affording the defendant a trial on the merits. In other words, the section does not mean what it literally says. Possibly the legislature should amend Section 999, and the related sections, to prescribe some limitations or conditions upon power to refile for the same offense. Examples of what might be considered appropriate conditions to sanction a refiling are: where there is newly discovered evidence (People v. Ayala, 1974 34CA 3d 360); where the first prosecution is aborted before trial because indispensable evidence has been mislayed (Mann v. U.S., supra.); where necessary witnesses become unavailable; where a demurrer is sustained for a defect in the pleading, and perhaps in a number of other like situations. While a dismissal without trial bars a subsequent prosecution for a misdemeanor, this bar has never been recognized in the case of felonies, presenting as they do, crimes of more serious proportion requiring more effective deterrent and punishment. There is no doubt that a subsequent prosecution for the same offense requires the defendant to incur some additional expense and to endure some prolonged mental anguish,. However, in view of the tradition of liberality in favor of refiling evidenced both in the statutes and the uniform decisions of our Courts, both State and Federal, this

Court has come to the conclusion that the Due Process Clause does not limit the prosecution to only one endeavor and that there is no denial of due process of law to a defendant arising from a subsequent prosecution for the same offense so long as the refiling represents a good faith effort by the prosecution to remedy or overcome the defects or infirmities inherent in the first prosecution, and so long as nothing approaching harassment or oppression motivates the prosecution in its later endeavor. Even in baseball the batter gets three strikes (with few exceptions), but defendants' argument, if accepted, would give the prosecution only one. Before any Court should so restrict the prosecution, it must address itself to the realities and difficulties encountered in criminal prosecutions. So much can go wrong in so many ways in a criminal prosecution before trial and this may well account for reason that the legislature has not even attempted to categorically and definitively prescribe the conditions upon the power to refile for the same offense. Although it is undoubtedly true that such refiling subject the defendant to some additional cost and some protracted mental anguish, on balance it would seem to be equally true that such inconvenience is minimal and inconsequential when viewed in the light of the paramount public necessity of effective prosecutions and punishment for crime. This Court reads the scales of justice as sanctioning a subsequent prosecution for the same offense even though in the case of burglary in the second degree the crime may be punished either as a felony or a misdemeanor. It would appear to this Court that alternatives of punishment have nothing to do with appropriate concepts of fair criminal procedure and the public policy underlying those concepts.

ORDER

Defendants' motion to dismiss the indictment is hereby denied.

Dated: June 28, 1974

HARRY R. ROBERTS
Judge of the Superior Court

APPENDIX I

§ 1538.5 Motion to return property or suppress evidence

(a) **Grounds.** A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any other violation of federal or state constitutional standards.

(b) **First hearing.** When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) **Evidence.** Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) **Effect of granting motion.** If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people.

(e) **Return of property.** If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section or Section 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

(f) **Felony; motion at preliminary hearing.** If the property or evidence relates to a felony offense initiated by a complaint, the motion may be made in the municipal or justice court at the preliminary hearing.

(g) **Misdemeanor; pre-trial motion at special hearing.** If the property or evidence relates to a misdemeanor complaint, the motion shall be made in the municipal or justice court before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) **Motion at trial.** If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the

grounds for the motion, the defendant shall have the right to make this motion during the course of trial in the municipal, justice or superior court.

(i) **Felony; renewal of motion at special hearing; review.** If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to *renew* or make the motion in the superior court at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

(j) **Relitigation of question after grant of motion; new evidence, review.** If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence

at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 10 days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review

thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) **Release of defendant pending resumption of proceedings in trial court.** If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j), the defendant shall be released pursuant to Section 1318 if he is in custody and not returned to custody unless the proceedings are resumed in the trial court and he is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (*o*) or a notice of intention to file such a petition, the defendant shall be released pursuant to Section 1318 unless (1) he is charged with a capital offense in a case where the proof is evident and the presumption great, or (2) he is charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 and the court orders that the defendant be discharged from actual custody upon bail.

(*l*) **Stay; time for trial; dismissal; continuance; bail or release.** If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 1238, or Section 1466 and, except upon stipulation of the parties, pending the time for the initiation of such proceedings. Upon the termination of such proceedings, the defendant shall be brought to trial as provided by Section 1382, and subject to the provisions

of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (*o*), the defendant shall be entitled to have the action dismissed if he is not brought to trial within 30 days of the date of the order which is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when such dismissal is upon the court's own motion and is based upon an order at the special hearing granting defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of such motion, he shall be entitled to bail as a matter of right, and, in the discretion of the trial or appellate court, may be released on his own recognizance pursuant to Section 1318.4.

(m) **Exclusive pre-trial remedy; review on appeal after conviction.** The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal

may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(n) **Motions on other grounds; existing law and procedure.** Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (iv) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to Section 995 or the procedures which may be initiated after the granting or denial of such a motion.

(o) **People's petition for mandate or prohibition; notice of intention.** Within 30 days after a defendant's motion is granted at a special hearing in the superior court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date which is less than 30 days from the granting of a defendant's motion at a special hearing in the superior court, the people, if they have not filed such a petition and wish to preserve their right to file such a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing,

whichever occurs last, a notice of intention to file such a petition and shall serve a copy of the notice upon the defendant.

(Added by Stats.1967, c. 1537, p. 3652, § 1. Amended by Stats.1970, c. 1289, p. 2380, § 2; Stats.1970, c. 1411, p. 2800, § 1.5.)